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117-327

Supreme Court of the United States.

No. 275.

SPEAR'S EXECUTOR

vs.

LIPSE'S EXECUTOR AND OTHERS.

Reply of Counsel for Appellant to the Brief filed by the Counsel for the Appellee, David H. Lipse, on his motion to dismiss this case, on the ground that the Record has not been printed as required by the rules of the Court.

Without commenting upon the purely technical character of the objection on which this motion is founded—it not being alleged or intimated that the record has not been correctly printed, or that the clerk of this Court has not treated it as having been printed and filed in accordance with its rules—the undersigned deems it proper to make the following statement of facts:

I was retained by the appellant, as one of his counsel in this case, in the summer of 1883, and was at the time informed by him that copies of the record, printed in Lynchburg, had been filed in the clerk's office of this Court, along with the manuscript copy certified by the clerk of the circuit court.

I soon afterwards wrote to the clerk of this Court, requesting him to enter my name as one of the counsel for the appellant, and to send me a copy of the record.

To this letter I received a reply stating that "the record will not be printed for at least a year."

I at once informed my client of this reply, and suggested to him that possibly the clerk did not regard the copies of the record, which had been filed, as having been printed in accordance with the rules of the Court, and that it would be best for him to get Mr. T. J. Kirkpatrick (his counsel, by whom they had filed), to look into the matter at once, and to do whatever might be necessary to comply fully with those rules.

This led, as I was informed by my client, to a correspondence with the clerk of this Court, who said that he had made a mistake in informing me that the record had not been printed; and that I would be furnished with one of the copies of those which had been filed.

Not receiving this copy as soon as I expected, I wrote to the clerk, on the 2d October, 1883, stating what my client had told me, and requesting him to send me a copy of the record, and to inform me whether rules nine and ten had been complied with, and the case regularly docketed, or whether there was anything further to be done to perfect the case for hearing.

To this letter I received a reply from the clerk, dated 5th October, 1883, stating that he sent me by the same mail a copy of the record, and explaining why he had not done so sooner: and, in answer to my inquiry, saying, "Case was regularly filed and docketed on 26th September, 1882. Deposit of $125 was made to secure costs."

After the receipt of this letter, I had no intimation from any quarter that it was supposed by any one that anything had been omitted which, under the rules of the Court, it was proper to do to perfect the case for hearing, until I heard, about the first of this month (April, 1885,), that the counsel

for the appellee, David H. Lipse, had notified Mr. Kirkpatrick, as one of the counsel for the appellant, that, on the regular call of the docket, he would make the motion now under consideration.

I know the fact that my client was willing to have the record printed over again, under the immediate supervision of the clerk of this Court—and that he would have done so if he had supposed that the rules of the Court had not been sufficiently and satisfactorily complied with.

Respectfully submitted by—

WM. J. ROBERTSON,

Of Counsel for the Appellant, W. A. Glasgow, Executor of Charles C. Spears, Dec'd.

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SUPREME COURT OF THE UNITED STATES.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Brief of G. W. Hansbrough, Counsel for the Appellees.

Johns & Goolsby, Printers, Richmond, Va

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STATEMENT.

In 1859, at his home in Botetourt county, Virginia, Moses Lipse died, leaving a will, twelve children and 391 acres of land. His sons, David H. and Samuel, were named as executors, and directed to sell the land and divide the proceeds among the children. Both qualified, and in 1860 sold the land to C. C. Spears for $14,858, and received cash $4,952.66, and two bonds of the purchaser, dated 3d October, 1860, each for $4,952.66, with interest from the maturity of each, payable to the executors in one and two years.

From 1850 continuously to the present, David H. Lipse resided in Indiana. He was present at the land sale in 1860, but shortly returned to Indiana, and was never again in Botetourt until 1874. In 1879 the other executor, Samuel Lipse, died in Botetourt, where he always lived, and was during the rebellion. In 1862 C. C. Spears died, leaving a widow, a child and a will, and William A. Glasgow qualified as his executor.

When the bonds fell due, David H. Lipse and about half the legatees, or their representatives, resided outside the State of Virginia then under control of "the organized rebellion called the Confederate States Government." The only currency then there in circulation was Confederate notes, commonly called Confederate money, or Virginia bank notes of about equal value with it. Samuel Lipse was known as a "Union man"; put no value on Confederate money, refused to take it, and did not willingly receive it in payment of debts due the estate of his testator or himself.

The situation of the estate did not require the collection of the purchase money of the land to pay the debts of the estate, for there were none; nor to make distribution, for half of the distributees were outside of Virginia, within the loyal States, and beyond the reach of the resident executor, Samuel Lipse. Half of the resident distributees refused to accept Confederate money, and there is no proof that any of them were desirous to accept it. In the meantime, the bonds of Spears due the estate, were perfectly solvent, being secured on valuable real estate.

Yet Spears' executor, went of his own accord, in October, 1862, to the house of Samuel Lipse, took with him a large bundle of Confederate money, counted out a sum equal to the unpaid balance due on the land and insisted on Samuel Lipse receiving it. But the latter refused, saying, "it was of no value, and that he had no use for it." [See deposition of Catherine McClure, Record, p. 66.] Spears' executor took the Confederate money away with him, after having asked Samuel Lipse if he would take a check on the Bank of Fincastle, which check the latter said he would accept, expecting to receive Fincastle money on it. No

check was then given. Spears' executor was a lawyer, and then the president of that bank, and well knew that nothing but Confederate money (or its equivalent in value—Virginia bank notes) was paid out at its counter. [See ordinances of the Virginia Convention passed June 28th, 1861, and 1st July, 1861, respectively.]

Afterward Samuel Lipse was induced to receive the check of Spears' executor on the Fincastle Bank for the balance of the said purchase money and surrendered the bonds. How induced, the record shows. Two of the legatees, Custer and Hoff, presented the checks of Lipse's resident executor on that bank for their portions, but refused to receive Confederate money; but afterwards did receive it under, as they testified, "a compulsion of threats." [See deposition of Joel G. Custer, Record, p. 75.]

A part of the Confederate notes so received by Samuel Lipse was sequestrated by the Confederate government.

Having thus induced Samuel Lipse to receive the Confederate notes, and surrender the bonds, Spears' executor induced Samuel Lipse to execute a deed, without the concurrence or knowledge of his co-executor, David H. Lipse, then in the State of Indiana, conveying the said land with general warranty to said Spears' executor. To an objection of Samuel that his conveyance without David's concurrence would be of no effect, he was told by Spears' executor that the General Assembly of Virginia had passed an act which met the case.

It may here be appropriately added that said act was passed 5th of March, 1863, and that the patron thereof was Green James, then delegate to said Assembly from Botetourt. [See deposition, Record, pp. 80, 81.]

The deed itself recited that it was executed under an act passed 5th of March, 1863, by the General Assembly of Virginia providing that whenever any fiduciary residing in this State has been authorized to do any act jointly with one or more fiduciaries residing within the limits of the United States, it shall be lawful for the fiduciary residing in this State to do any such act without the concurrence of the non-resident fiduciary. This act of the Gen-

eral Assembly was in contravention of the previous law, and was to remain in force only during the war.

This deed was executed 7th April, 1863, and was with general warranty. By deed executed the same day, with special warranty, Spears' executor conveyed the same land to one McCue for $15,000, whereof $3,000 was paid cash in hand, and for the balance payable on the 18th August, 1882, in gold coin of the value of the alloy of the United States in the year 1861, and also for the interest thereon at the rate of six per cent. per annum, payable on the 1st day of January, 1864, and annually thereafter in such funds as may be current in the State of Virginia, or in merchantable corn or flour, at two dollars a bushel for corn and fifteen dollars a barrel for flour, as the said Spears' executor, or his successor, may from time to time elect to receive it, or in gold coin or its equivalent if the said McCue prefer to pay the interest in such medium, the said purchaser executed a deed of trust on the same land. Subsequently, by deed dated 2d November, 1863, McCue conveyed the said land to one McCulloch for $23,500, whereof $11,500 was paid cash in hand, and for the balance payable as by McCue to Spears' executor, a deed of trust was again executed on the land. Record, pp. 19–24.

The whole of the $12,000, payable as aforesaid, in gold or its equivalent, remains unpaid by McCue to Spears' executor, and to McCue by McCulloch, who has remained in possession of the land from his purchase until the present.

The evidence clearly shows that David H Lipse, the surviving executor, never at any time authorized, or sanctioned the receipt, by his co-executor, of the said purchase money, or of any part of it, in the currency of the Confederate Government, or in said Virginia bank notes, nor the conveyance of the land.

The evidence also shows that in 1862 and 1863, and in fact all during the war, the public sentiment in Botetourt was much excited against persons of Union proclivities, and that persons refusing to take Confederate notes were threatened and denounced as enemies in a public speech delivered in the courthouse by a member of the General Assembly, who had privately advised

Samual Lipse to receive the Confederate notes from Spears' executor.

In January, 1879, David H. Lipse, as surviving executor of Moses Lipse, deceased, instituted this suit in the U. S. Circuit Court, at Lynchburg, Virginia, in order to procure the cancellation of the deeds of conveyance and trust aforesaid, and the enforcement of his vendor's lien, on the said land, for the unpaid purchase money.

In October, 1864, whilst the war was flagrant, and his co-executor was at his residence in Indiana, a settlement of the accounts of Samuel and David Lipse, executors of Moses Lipse, deceased, was made by James T. Logan, one of the commissioners of the county court of Botetourt county, and in November of that year, confirmed by said county court, and ordered to be recorded.

Spear's executor, and others, answered the bill, and numerous depositions were taken on both sides.

In his answer Spears' executor plead said settlement of the executorial accounts, as an absolute bar to any recovery by the complainants upon their bill.

For reasons assigned in an able opinion which is printed as a part of the Record (p. p. 119-123), the said circuit court on the 1st day of April, 1881, decreed that the said deeds of conveyance and trust be cancelled, and that the said David H. Lipse, surviving executor, as aforesaid, recover of William A. Glasgow, executor of C. C. Spears, deceased, to be paid *de bonis testatoris*, the sum of $9,905.33 with interest at the rate of six per centum per annum on $4.952.66 thereof, from the 3d October, 1861, and on the residue from 3d October, 1862, till paid, and his costs by him about his suit in this behalf expended; and that in default of the payment thereof within 90 days, the said land be sold by a special commissioner; and to the decree is subjoined the following clause:

"The said commissioner shall hold the proceeds for distribution among the parties according to their rights, as may hereafter, at the election of the said Glasgow, be ascertained by refer-

ence to a master, as to the voluntary receipt of legacies from Samuel Lipse, one of the said executors. While this reservation is made for defendant Glasgow, executor of C. C. Spears, deceased, so that he may not be prejudiced in any claim he may be advised to assert against such of the parties as may have voluntarily received their legacies in this depreciated currency, he cannot now, or at any future time, be entitled to any credit on the payments claimed by him to have been made by him to the said Samuel Lipse in his lifetime, which have already been disallowed by this court as payments on the bonds for the deferred payments on the said land."

From this decree Spears' executor hath appealed to this court.

The counsel for the appellee, David H. Lipse, surviving executor of Moses Lipse, deceased, humbly submits that there is in said decree no error whereby the appellant is aggreived. In support of said decree that counsel deems it appropriate here to refer to and make a part of his brief, the said opinion of the honorable judge of the court below, which is printed in the record on pages 119 to 123 inclusive.

ARGUMENT.

1. *In limine*, the surviving executor is met with the plea that the *ex parte* settlement of the executorial accounts made and confirmed in the fall of 1864, is an absolute bar to any recovery upon his bill, showing, as it is claimed, the payment of the purchase money of the land by Spears' executor, and the distribution of the money.

Said settlement was presumably made under Virginia Code of 1860, chapter 132. Such settlement is designed for the benefit of the executors chiefly, and also of the distributees, but never for the benefit of a debtor of the estate who is no party thereto. Section 23, says: "The report" (of the settlement) "to the extent to which it may be confirmed, shall be taken to be correct, except so far as the same may be in a suit in proper time, surcharged and falsified."

In *Butterfield v. Smith*, 11 Otto, 570, this court held that where "an executor charged himself in the inventory of the estate of the testator, with a note, payable to the latter and secured by mortgage, and his accounts were settled on that basis, and an administrator, with the will annexed, subsequently brought suit to foreclose the mortgage (1) the probate record showing the inventory and the order for distributing the assets of the testator, is not conclusive evidence that the note has been paid; and (2) an executor's settlement when adjudicated, binds only the parties thereto;" and said: "Nothing is more common than for an executor to charge himself with debts due the estate before they are collected, and thus expedite a final settlement. It would be dangerous to hold that, as between the executor and debtor, such a settlement was conclusive evidence of the actual payment of the debt and the discharge of the debtor."

And in *Utterback's adm'r* v. *Cooper*, 28 Gratt., on page 270, the Virginia Court of Appeals said: "The mere fact that the debt is credited in the administration account, cannot destroy the original security given for its payment. That security will be kept alive so long as the debt is unpaid."

This is a complete answer to the plea of absolute bar, even as to Samuel Lipse, the resident executor, who was a party to the settlement.

But the answer of the surviving executor, who was *no party* to said settlement, rests on additional and stronger grounds.

The latter was in Indiana; beyond the jurisdiction of the county court of Botetourt, whose commissioner made, and which confirmed the settlement.

The war was flagrant between the State of Virginia, whereof Botetourt is a part, and the United States, whereof the State of Indiana is a part. No notice, actual or constructive, personal or substitutional, was served on him. He had no day in court. In *Underwood* v. *McVeigh*, 23 Gratt., p. 418, the Supreme Court of Appeals of Virginia, said: "It lies at the very foundation of justice, that every person who is to be affected by an adjudication, should have the opportunity of being heard in

defence, both in repelling the allegations of fact, and upon the matter of law; and no sentence of any court is entitled to the least respect in any other court, or elsewhere, when it has been pronounced *ex parte*, and without opportunity of defence. See also *Connolly* v. *Connolly*, 32 Gratt., p. 666; *Singleton* v. *Singleton*, 8 B. Monroe 340; *Gray and al.* v. *Stuart & Palmer*, 33 Gratt. 358--9.

The Virginia Statute (Code 1860, chapter 132, sections 9, 14 et seg,) which provides for such settlement, provides also that they shall be made at the instance of the executor, or of any creditor, legatee, or distributee of the decedent, and that in the latter case, the executor shall be brought before the commissioner or the court by the service of a summons or rule upon him.

But the record of this settlement neither contains evidence of due service of notice to the executors, or either of them, of the time and place of the making thereof, nor recites such service; nor does it show that the settlement was made at the instance of the executors or of either of them. And whatever inferences may be deduced from the facts of the case that the resident executor had notice of, or participated in the settlement, certainly none such can be deduced as to the non-resident executor. On the contrary, there is positive evidence that the latter had no notice of the settlement when it was made, and never afterwards sanctioned it. See deposition of D. H. Lipse, Record p. 88--97.

2. The land was sold for specie or its equivalent in the currency of the United States. The purchaser's bonds were dated 3d October, 1860, and each contained a promise to pay four thousand nine hundred and fifty-two and sixty-six hundredths dollars. "A promise to pay a specific sum in dollars, or to pay so many *dollars*, is a contract to pay a particular kind of currency. It is a contract to pay a specie currency. This is the legal effect of such a promise, according to universal understanding in Virginia. This rule has been modified, of course, by the legal tender acts, but the principle is unaffected." So said the Court of Appeals of Virginia, per Staples, J., in *Hilb* v. *Peyton and als.*, 22 Gratt. pp. 561–2.

Apart from the legal construction of the word "dollars" in the contract, the evidence of those present at the sale, and the terms of the several sales of the same land in 1862, clearly show that the debt due in October, 1861, and in October, 1862, by Spears' executor to Lipse's executors as the balance of purchase money of the said land, was payable in gold, or at least in current bank notes, redeemable at par in gold on presentation at the counter of the banks issuing them.

Fretz v. *Stover*, 22 Wall. 205, is in point; and in *McBurney* v. *Carson*, 9 Otto, 570–1, this court said: "The executors sold the property to Ball in the spring of 1857 for $50,000. He paid $15,000 down, and gave his bonds for the balance, secured by a mortgage on the premises, as before stated. The property was valuable and the amount due well secured. The debt was payable only in lawful money of the United States, and the executors had no right to take anything in payment but such money or its equivalent."

3. Had Samuel Lipse been the *sole* executor of Moses Lipse, deceased, he would not have been authorized to receive, and Spears' executor would not have had the right to make payment of such a debt, due to the former's testator in specie, or other lawful money of the United States, in unlawful and depreciated currency, or, in fact, in anything other than legal tender money.

In *Alley* v. *Rogers*, 19 Gratt. 365, the Court of Appeals of Virginia decided that the bank had no authority to receive payment in depreciated Confederate currency, of notes due before such currency came into existence; that the debtor had no right to make such payment; that said payment was not a valid one; that the notes still belonged to the creditor, and that the deed of trust for his benefit was still a subsisting security, in full force and effect, which decision was cited with approbation by this court in *Fretz* v. *Stover*, *supra*.

In *Purdie and Wife* v. *Jones and als*, 32 Gratt. 834, the same Court of Appeals said: "The debtor has no right to pay a debt which he contracted for in specie with depreciated paper currency without the consent of the party to whom it is due."

Ewart v. *Saunders*, 25 Gratt. 207; *Tosh* v. *Robertson*, 27 Gratt. 277; *Pilson, trustee*, v. *Bushong*, 29 Gratt. 237.

In *Patterson* v. *Bondurant*, 30 Gratt. 95-6, the same Court of Appeals said that it is well settled by several decisions of this court, that a fiduciary is not justified in receiving depreciated currency in payment of a debt which was equivalent to gold, unless necessary to pay debts or legacies, or to save the debt; that such collection would be *devastavit* in the executor, and that he who paid it thus knowing that it was not needed to pay the debts or legacies or to save the debt, and that its receipt would involve the executor in a *devastavit*, would be held to be a participant in such *devastavit*.

And in *Pinckard* v. *Woods*, 8 Gratt. 145; *Fisher* v. *Bossett*, 9 Leigh, 119; *Cocke* v. *Minor*, 25 Gratt. 258; *Jones* v. *Clarke*, 25 Gratt. 662, and *Purdie* v. *Jones*, 32 Gratt. 834, that court held that it was the duty of the payor in all such dealings with a fiduciary to make inquiry whether or not the situation of the estate made the same necessary, and that the burden was on him to prove the necessity.

So far have the decisions of the Virginia court gone in making invalid the payment to an executor of a specie debt in a depreciated currency. And it is submitted that, squared by the rule established by the Virginia decisions, the payments made by Spears' executor to Samuel Lipse, even had he been sole executor, were invalid, and did not discharge the debt due his testator's estate for the purchase money of the said land. That debt was payable in specie and well secured. Its collection was not necessary to pay the debts or the legacies, or to secure an insecure claim. Spears' executor was aware of the situation, or might readily have acquired knowledge thereof by an inquiry, which it was incumbent on him to make before thus dealing with an executor, and before seeking to pay such a debt in that wherein he knew it was not lawful that it should be paid. He was active in putting on Samuel Lipse a currency which, in his view, it was unlawful for him to receive, and which he considered valueless, but which, under the surrounding circum-

stances, he was not wholly free to refuse; circumstances which recall the language of Burks, J., in *Pilson, Trustee*, v. *Bushong*, 29 Gratt. p. 238: "The means used by Pilson to induce Larew to receive depreciated currency in discharge of bonds payable in gold coin, or in a currency equivalent in value to gold, may not have amounted to duress in the strict sense above indicated, but they were designed and were sufficient to control that perfect freedom of will and conduct which Larew as agent was entitled to exercise in the matter. He was unwilling to receive the currency. He refused to receive it. It was his right, and under the curcumstances, his duty to refuse," . . &c. Those circumstances also recall the language of *Anderson, J.*, in *Patterson* v. *Bondurant*, 30 Gratt., on pages 97 and 98: "It appears that less than twelve months before, this same executor, when he paid Mrs. Patteson, the executrix, the interest then due on the said bond, proposed to pay her in a short time the principal in Confederate money, when she informed him that she was unwilling to receive it, and had no use for it. Confederate money was then of much greater value than it was when she received it. How can this be explained? It is accounted for by the evidence in the record . . . . It is evident that the executrix acted under constraint. She did not freely and willingly receive it, but took it because she felt that there was no help for her; that she was obliged to receive it, or submit to what she regarded as a greater evil."

4. But it is also humbly suggested that the decisions of this court have gone much further, and establish the clear and unqualified doctrine that an executor has no right to receive, and the debtor has no right to pay in discharge of a specie debt, anything but the legal currency of the United States.

It is doubtless unneccessary, but may be allowable, to quote to this honorable court from its own decisions, and recall that in the oft-cited case of *Ward* v. *Smith*, 7 Wall. 452, it said: "It is established by all the authorities that the power of a collecting agent by the general law is limited to receiving for the debt of his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money and passes as such at par."

Fretz v. *Stover*, 22 Wall. 198, in its most prominent features, is not unlike the case at bar. There, a citizen of Pennsylvania, just before the breaking out of the war, took the bond of a citizen of Virginia, secured by a deed of trust upon real estate. Chilton, the attorney of the creditor, was the trustee in the deed. During the war Chilton received payment in Confederate notes and Virginia bank notes of no greater value After the close of the war the creditor sued for his debt. This court said that Chilton had no right to receive and Stover, the debtor, had no right to pay the said bond in Confederate paper and Virginia bank notes, but only in the legal currency of the United States, and decreed that the payment was void and that the bonds and trust deed be enforced.

But *McBurney* v. *Carson*, 9 Otto. 567, much more resembles the case at bar. Carson, of South Carolina, died in 1856. He devised his land there to his executors, Robertson and Blacklock, to sell, pay his debts and hold balance in trust for his widow and two sons. Executors sold his land, "Dean Hall," to Ball for $50,000, received $15,000 cash, and Ball's bonds secured by mortgage on the land for the balance. In 1863 Ball sold and conveyed "Dean Hall" to McBurney & Co. for $100,000 in Confederate notes, and out of the proceeds paid his bonds to Robertson, who discharged the mortgage, and invested the notes in Confederate bonds, which at the close of the war were worthless. Blacklock, the other executor, was then absent from the country. On his return he refused to recognize the transaction. The widow filed her bill to set aside the cancellation of the mortgage. This court held that the debt was payable only in lawful money of the United States, and that the executors had no right to take anything in payment but such money or its equivalent.

It also held that there was evidently a plot—"McBarney & Co. its contrivers; Ball its instrument; Robertson the dupe, and the Carsons the victims." It added, that, "if the case stopped here, we could not hesitate as to what our judgment should be. But in its strictly legal aspect it is equally free from doubt."

The court then cited the cases of *Ward* v. *Smith*, *supra*, *Horn*

v. *Lockart* (17 Wall 570), *and Fretz* v. *Stover, supra*, as authority for its said ruling that "the debt was payable only in lawful money of the United States, and the executors had no right to take anything in payment but such money or its equivalent."

Applying that ruling to the case at bar, and stripping this case of all adventitious circumstances, and reducing it to the naked proposition that the debt due from Spears' executor to Lipse's executors in October, 1861, and October, 1862, was payable in lawful money of the United States, then the ruling that "the executors had no right to take anything in payment of it but lawful money of the United States or its equivalent," and of course, it inevitably follows that the payments thereon made by Spears' executor, whether in Confederate notes or Virginia bank notes, were invalid, that the debt for the said purchase money still subsists, and that the surviving executor of Moses Lipse, deceased, is entitled to collect the same.

Spears' executor says that he paid $3,000 on 4th November, 1861, and $1.990.73 on 1st March, 1862, and the balance on 23d October, 1862, in such currency, Record, pp. 157–8; but the deed of 7th April, 1863, merely recites that it was paid without saying when it was paid, and the presumption is that it was paid as of the date of the conveyance.

In *Ward* v. *Smith, supra*, Ward had in 1860, executed his bond to Smith for land, for about $4,000, payable at a bank in Alexandria. In February, 1861, the bond was left at the bank for collection. W., between June, 1861, and April, 1862, deposited in the bank at different times, various sums, in notes of different banks of Virginia, which sum the cashier, without the knowledge of S., endorsed as credits on the bond. After the war S. brought suit on the bond, and recovered judgment. On error, this court affirmed the judgment. Mr. Justice Field, in delivering the opinion of this court, said: "When the bond was placed in the bank for collection, the bank became the obligee's agent to receive payment. The agency extended no further, and without special authority, an agent can only receive payment in the legal currency of the country. In this case the bank was

not authorized to receive in payment of the bond, depreciated notes of the banks of Virginia. The fact that these notes constituted the principal currency at Alexandria could not alter the law. They were not legal tender, and could not have been sold for the amount due in legal currency. . . Notes not thus current at their par value, nor redeemable on presentation, are not a good tender whether objected to at the time or not."

Confederate notes and Virginia bank notes very early after the war began, became of about even value, and at its close were equally worthless, the capital of the banks having been invested in county, State and Confederate bonds under the authority of several ordinances of the secession convention. See ordinance of June 18th, 1861, authorizing the banks to buy county bonds for the support of Confederate soldiers; ordinance of 28th June, 1861, authorizing the banks to loan money to the C. S. government, and to receive and circulate Confederate notes; and ordidinance of 1st July, 1861, *requiring* the banks to receive Confederate notes.

5. But strong and clear as the case of the appellee, David H. Lipse, seems to be, as already presented, it appears clearer and stronger when it is considered that by his will the testator, Moses Lipse, deceased, created in his two executors, David H. Lipse, of Indiana, and Samuel Lipse, of Botetourt, Virginia, a *joint* power and trust to sell his land, and to divide its proceeds among all his children. See will, Record, pp. 12--13.

By the Virginia Code of 1849, chapter 131, section 1, (which is the same as section 1, on page 599 of the Virginia Code of 1860, and as section 1, on page 942 of the Virginia Code of 1873), it is prescribed that: "Real estate devised to be sold shall, if no other person than the executors be appointed for the purpose, be sold and conveyed, and rents and profits of any real estate which executors are authorized by the will to receive, shall be received by the executors who qualify, or the survivor of them. If none qualify, or those qualifying die, or are removed before the trust is executed or completed, the administrator with the

will annexed shall sell or convey the land so devised to be sold, and receive the proceeds of sale, or the rents and profits aforesaid, as an executor might have done."

Both David H. and Samuel qualified as such executors. See Record, p. 14

Both united in selling the land under their *joint* power to C. C. Spears. See memo. of sale and deed of conveyance to Spears' executor; Record, pp. 31 and 16.

The sale was for $14,858. One-third was paid cash in the equivalent of gold coin; for the balance Spears executed to the vendors, as executors of Moses Lipse, deceased, his two bonds each for $4,952.66, payable on 3d October, 1861, and 3d October, 1862, respectively. They were payable in the lawful money of the United States, and in nothing else. But in the absence of his co-executor, and without his previous, consent, or his subsequent sanction, under the circumstances aforesaid, the resident executor, Samuel Lipse, without legal authority, was induced to accept, and Spears' executor paid an unlawful and depreciated currency, and procured from said Samuel not only the surrender of the said bonds, but also a deed conveying said land to him as such executor. The statute above quoted was in force when the will was made and probated, and also when the land was sold, and the bonds were executed, and *constituted a part of the obligation. Edwards* v. *Kearsey*, 6 Otto, 595.

Under the law the executors of Moses Lipse, deceased, having a joint power and trust, were required to perform the same by their united action, and could not do so separately. This duty applied not only to the sale and conveyance of the land, but also to the receipt and division of the proceeds among all of the testator's children.

To show how closely delegated authority has in Virginia, as well as in England, has been required to be adhered, to and is never allowed to be transcended, attention is respectfully invited to the rulings of our Supreme Court of Appeals.

In *Johnston* v. *Thompson*, 5 Call, 248, it was decided in 1804, that: "If a testator before the revolution directed that his *ex-*

ecutors should sell his lands, a sale by one was void, unless it appeared that the other was dead or refused to qualify."

And so a sale by one without the consent of the rest *Deneale* v. *Morgan*, 5 Call, 407.

The reason being, as expressed in 1 Bacon Ab., 203, old Ed., and 9 Coke Rep., 75 b, and 76 a, because: "The testator had vested a personal confidence in *all* of them, which could not be delegated." And so, Lord Coke says: (Co. Litt., page 181 b) "If a man devise that his *two* executors shall sell his land, if one of them die, the survivor shall not sell."

These two decisions were under the statute of 21 Hen., 8, ch. 1, which modified the common law, and which in turn was modified by the Virginia act (1 R. C. of 1819, p. 388, section 52), which was not passed until 1785. But these statutes are essentially the same as section 1, ch. 131, Code of 1849, quoted, *supra.*

And in 1809, by the Court of Chancery, Richmond, District of Virginia, in *McCrae* v. *Farrow*, 4 Hen. and Mun. 444, it was decided that "a testator having directed a sale and conveyance of his land by his *executors*, all of whom qualified; a conveyance by *some only* of them, is not valid, either at law or in equity; nor does payment of the purchase money give the purchaser any lien on the land."

The questions were, 1. When a testator had directed his land to be sold and conveyed *by his executors*, in general terms, and they all three had qualified, was a conveyance by two of them valid *in law*?

2. If it was not, could it be aided in equity?

3. If it could not, did the purchase money, if paid, create a *lien* on the land, subjecting it in equity to a repayment of the money?

The chancellor answered all three questions in the negative. He said: "Upon the first question, I think the law was rightly settled in this case in the old general court in 1774, that the conveyance was not valid, and the maxim is that equity follows the law; and therefore on the second question the plaintiff can-

not be heard in the court. And as to the third question, if the purchase money was paid, it created no lien on the land, because the plaintiff neither derived a legal nor an equitable right thereto, and must be left to his remedy at law."

And in 2 Commentaries, 423, Judge Tucker says: "Two or more executors invested either with a naked power, or an authority coupled with an interest, cannot act independently of each other where all qualify. The authority being joint, must be jointly executed."

Such being then the law, and the joint power of the executors when the will took effect, and the sale was made, and those two executors undertook jointly to convey the land when the purchase money was all paid as agreed in specie or its equivalent, can it be contended successfully that a payment in an unlawful currency to one of the two executors, could entitle the purchaser to a conveyance of the land? Certainly not under the then existing law. Nor did Spears' executor claim to be so entitled. He based his claim to a conveyance after making the invalid payments as aforesaid, not on the law existing at the time of the making of the will, the sale and the payments, but on a subsequent act of the insurgent legislature, which whether passed to meet this case or not, yet did, as he supposed, meet it, on the 5th day of March, 1863, and in the conveyance which he induced Samuel Lipse to execute, with general warranty, he substantially recites that act as authority for that executor's sole action.

The said act is found on page 81 of Acts of Assembly, 1862 and 1863, and is section 2 of the act entitled "An act authorizing fiduciaries to invest funds in their hands in certain cases, and for other purposes." Section 2 is as follows:

"2. Be it further enacted, that whenever any fiduciary or fiduciaries, trustee or trustees, residing in this State have been, or may be, authorized to exercise any power or to do any act jointly with one or more fiduciaries, trustee or trustees, residing within the limits of the United States, it shall be lawful for the fiduciary or fiduciaries, trustee or trustees, residing in this State, to exer-

cise any such power, or to do any such act without the concurrence of the non-resident fiduciary or fiduciaries, trustee or trustees; and the act of the resident fiduciary or fiduciaries, trustee or trustees, shall have the same force and effect, to all intents and purposes, as if it had been the joint act of all such fiduciaries or trustees.

"3. This act shall be in force from its passage, and continue in force until the expiration of six months after the ratification of a treaty of peace between the Confederate States and the United States."

It is humbly submitted that the appellant cannot validate the invalid payments and the invalid conveyance by this act of Assembly, for the plain reason that this act is itself invalid, being clearly unconstitutional, and so the court below promptly held.

It is contrary to the Constitution of the United States for two reasons: (1). It comes within the ruling of this court in *Edwards* v. *Kearzey*, 6 Otto, 595, where it was held: "The remedy subsisting in a State when and where a contract is made and is to be performed, is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution of the United States, and therefore void." And this court there said: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement."

Now, the right of the non-resident executor to withhold conveyance of the land until the purchase money had been lawfully paid, was within the obligation of the will and of the contract of sale, and was impaired by this act of Assembly. (2). It was a measure of belligerency designed to last only during the war, and to militate against the interests of loyal citizens, such as were David H. Lipse, of Indiana, and his co-complainants. See *Horn* v. *Lockhart*, 17 Wall. 570, and *Williams* v. *Bruffey*, 6 Otto, 176.

The deed of conveyance from Samuel Lipse to Spears' executor, being then invalid, and all subsequent conveyances of the land being therefore nullities, the title to the said land remains

in the surviving executor as security for the enforcement of the payment to him of the two bonds which were executed by Spears for the purchase money thereof, and which have never been lawfully paid.

And such was the decree of the court below, of which the appellant here complains, and makes nine assignments of errors.

ANSWER TO ASSIGNMENTS OF ERROR.

It is humbly submitted that by the arguments and authorities already presented in defence of that decree, satisfactory answers have already been made to most of those assignments, and that therefore only a brief resumé thereof will be necessary.

It appears most suitable to state and answer those assignments in their inverse order.

(9). The appellant contends that "it was error not to dismiss the bill on the ground that in the case stated therein fraud, duress, deceit, etc., was wholly unsupported by the evidence adduced."

Answer. It is not contended that there is direct proof of fraud, but only such as arises from the circumstances and conditions of the parties. In *Utterback's Adm'r* v. *Cooper*, 28 Gratt., on page 288, the Virginia Court of Appeals said: "Fraud is rarely the subject of direct proof. In general, it can only be established by circumstances." In order to illustrate this idea reference is again made to *Fretz* v. *Stover*, 22 Wall. 207, where this court said: "If the trustee (Chilton) could not receive payment of the bond in Confederate paper and Virginia bank notes, neither had the debtor (Stover) the right to pay them. It was a void act on his part to attempt to discharge his debt in this way, as well as a fraud in Chilton to suffer him to do so. His obligation when the bond fell due was to pay it in legal currency of the United States, and yet he tries to discharge it in paper worthless to Fretz (the non resident creditor), and with knowledge that, worthless as it was, it could not be sent to him. . . . . As a sensible man, Fretz must have known that Chilton had no authority to make the sacrifice, especially as the debt was well secured upon a valuable farm. It is impossible to escape the conviction that

there was collusion between Chilton and Stover in the transaction, but whether this be so or not, the transaction itself was invalid." This is strictly applicable to the case here, only Samuel Lipse was manifestly more sinned against than sinning.

McBurney v. *Carson* is also illustrative. There, as here, the bill charged, in substance, that the bonds were procured to be surrendered and the mortgage discharged by fraud, &c., and that the transaction was in other respects invalid. Reviewing the circumstances briefly, this court said: "There was evidently a plot. McBurney & Co. were its contrivers, Ball was the instrument, Robertson was the dupe, and the Carsons were the victims. If the case stopped here we could not hesitate as to what our judgment would be. But in its strictly legal aspect the case is equally free from doubt." This court went on then to decide that the executors had no right to receive anything in payment of the ante bellum specie debt, but the lawful money of the United States or its equivalent, and to affirm the decree appealed from, which charged upon the land the amount due on the land, and directed the mortgage to be enforced in all respects as if the bonds had not been surrendered and the mortgage had not been cancelled.

It is submitted that there is much more evidence of undue advantage taken of the receiver by the payor in this case, than there appears to have been in either of the two last mentioned cases. But in this case, as in those, however that may be, the transaction was invalid, and the bill and the proof made a case for relief on that ground alone.

In regard to the alleged duress, it is only necessary to refer to the remarks of Burks, J., in *Pilson, Trustee*, v. *Bushong, supra*, and of Anderson, J., in *Patterson* v. *Bondurant, supra*, which are quoted on pages — and — of this brief.

(8). Appellant contends that 'it was error to exclude the portions of the deposition of W. A. Glasgow, which referred to his transactions with Samuel Lipse."

Answer. The decree (Record, p. 62), "on motion of the plaintiffs, by their attorneys, the court adjudged, ordered and decreed that the deposition of William A. Glasgow (Record, pp. 112–

119), taken in this cause, be ruled out as incompetent testimony against the estate of Moses Lipse, deceased, so far as the latter deposition concerns transactions which are the subject of investigation in this cause and to which Samuel Lipse, who was deceased at the time the same was taken, was a party, though at the hearing of this cause the defendants tendered the bond of F. T. Glasgow undertaking and assuming to pay the costs for which said Glasgow as such executor might be liable in this cause, which bond is solvent and sufficient."

The answer of William A. Glasgow, Spears' executor (Record, p. 30), says: "That all his transactions in the premises had been with Samuel Lipse, whose lips had been sealed in death when this suit was brought."

This ruling of the court below was founded on Code of Virginia of 1873, ch. 172, sections 21 and 22, and the latter section as amended by an act approved March 21, 1877. See Acts 1876–7, pp. 184–5.

Sec. 21. "No witness shall be incompetent to testify because of interest; and in all actions, &c., the parties thereto, &c., shall, if otherwise competent to testify, be competent to give evidence in their own behalf," &c.

Sec. 22. "Nothing in the preceding section shall be construed to alter the rules of law now in force in respect to the competency of husband and wife as witnesses for or against each other during the coverture, or after its termination, nor in respect to attesting witnesses to wills, deeds or other instruments; and where one of the original parties to the contract or the transaction which is the subject of the investigation is dead or insane, or incompetent to testify by reason of infamy or any other legal cause, the other party shall not be admitted to testify in his own favor, or in favor of any other party having an interest adverse to that of the party so incapable of testifying, unless he shall be first called to testify on behalf of such last mentioned party, or unless some person having an interest adverse to that of the party so incapable of testifying shall have previously testified to some fact occurring before such inability accrued; or unless the

contract or other transaction, which is the subject of investigation, was made or had with the agent of the party so incapable of testifying, who is alive and competent to testify; or unless in case of partners or other joint contractors, when the person who has become incapable of testifying was not the only partner or other only joint contractor with whom such contract or other transaction was personally made or had; and when one of the parties is an executor, administrator, curator, or committee, or other person representing a dead person, an insane person, or a convict in the penitentiary, the other party shall not be permitted to testify in his own favor, unless such contract or other transaction was originally made or had with a person who is living and competent to testify, except as to such things as have been done since the powers of such fiduciary were assumed, and except also when some other party in interest has previously testified; or unless some person having an interest adverse to the party so incapable of testifying shall have previously testified as aforesaid."

And also under said Code and chapter, section 19, which reads:

Sec. 19. * * * "No trustee, executor, or other fiduciary shall be incompetent as a witness in any case by reason only of his being a party thereto, or of his being liable to costs in respect thereof; but if liable to costs he shall not be competent unless some person undertakes to pay the same."

At the taking of the said depositions, as well as at the hearing of this cause, the plaintiff excepted to the said W. A. Glasgow as a witness, both because he was executor of C. C. Spears, and because Samuel Lipse, with whom the matters testified to by this witness were transacted by said witness with said Samuel Lipse, who was then dead, and on this account the plaintiff declined to cross-examine said witness. The object of the said section 22 was to place the parties on a footing of equality, so that if one of the parties to the transaction, which is the subject of investigation, is incapable of testifying, the other party to said transaction shall be incompetent to testify.

In *Ellis* v. *Harris' Ex'or*, 32 Gratt. 692, the Virginia Court of Appeals in speaking of said 22d sec., said: "The plain purpose of the legislature was to declare that where the lips of one party to the original contract or transaction, which is the subject of investigation, are closed in death, the adverse party shall not speak at all." And the same is said by the same court in *Griggby* v. *Simpson*, 28 Gratt. 353

In the case of *Ellis* v. *Harris*, *Ex'or*, *supra*, the said executor was adjudged to be a competent witness in the case, expressly on the ground that he was not a party to the transaction which was the subject of the investigation. And likewise in *Martz's Ex'or*, v. *Martz's Heirs*, 25 Gratt. 361.

And being also incompetent as executor of Spears and liable to costs in this cause, his restoration to competency could only be effected by bond for the costs given *before* the taking of his deposition. Here it was not given till the hearing of the cause, and after the objection to the competency of the witness had been made in court.

None of William A. Glasgow's deposition should have been read as evidence against Moses Lipse's estate. But it is plain, that had the whole been read, it would have made no difference in the decree.

But it is earnestly submitted that even if the entire deposition was admitted and considered as evidence, there is nothing therein which could affect the decree complained of, or alter the decision of the court below, or of this honorable court on the case made by the pleadings thereof.

(7). The appellant also contends that "it was error not to dismiss the plaintiffs' bill on the ground of *laches*. After the war was ended, these parties waited 14 years before bringing this suit. During that period important witnesses died, thus rendering it impossible for justice to be secured."

Answer. The circumstances of this case excuse the delay. Mere lapse of time, unaccompanied by circumstances showing abandonment of claim, does not amount to *laches*. In *Nelson* v.

Carrington, 4 Munford 332, 343, the court said: "Such lapse is only permitted in equity to defeat an acknowledged right, on the ground of affording a presumption, that that right has been abandoned; and it never prevails when that presumption is outweighed by opposing facts and circumstances."

In *Tazewell* v. *Saunders*, 13 Gratt. 354, it was held that: "Laches to defeat a claim, must be such as to afford a reasonable presumption of the satisfaction or abandonment of the claim, or such as to prevent a proper defence by reason of the death of parties or otherwise. See also *Updike* v. *Lane* and *Coles* v. *Ballard*, 78 Va. Rep. 132 and 139.

No records or papers in this case have been lost. No witness has died, except the resident executor, Samuel Lipse, to whom the payment in unlawful currency was made, and by whom the bonds were surrendered, and the conveyance was made. By his death the appellant has lost nothing. This fact is apparent from what other witnesses testified he told them. See Record p. 92, where in question by appellant, D. H. Lipse deposed that Samuel Lipse told him that Mr. Glasgow had tendered him the Confederate money at his house, but that he refused to take it; and Record, page 108, where Linkenhoker deposes, that "Samuel Lipse told him that he had received Confederate money in payment of the Moses Lipse land, but that he would not have received it if he had known that he was not obliged to take it; that he said, that they said, that he was obliged to take it, and he said he would be taken up if he did not receive it;" and that witness' depositions *passim*; and Record, p. 74, Joel P. Custer's deposition *passim*; and Record, p. 65, Catherine McClure's depsition *passim*; and Record, p. 86, B. Brugh's deposition *passim*; also the deposition of H D. Lipse, p. 69, and of Samuel M. Lipse, Record p 71 *passim*.

There was no other currency in circulation in Botetourt county, in October, 1861, and October, 1862, when the bonds fell due, except Confederate notes and Virginia bank notes of about equal value; and even Spears' executor does not claim that the payments were in the lawful money of the United States.

"The war lasted four years. Stay laws were in force four years longer. Laches cannot be imputed during these periods." Burks, J., in *Stamper* v. *Garnett*, 31 Gratt. 569.

Not until 26 February, 1870, was Virginia fully reconstructed. See Code of Virginia, 1873, p. 29. The decisions of the Virginia courts on the subject of payments of *ante bellum* debts in Confederate notes, were very confused. Section 1, of the act of 5th of March, 1863, never received full judicial construction until the decision of *Crickard* v. *Crickard*, 25 Gratt. 410, in September, 1874; and section 2 of the said act (that under which the conveyance was made by Samuel Lipse) has never received any judicial construction. The numerous parties in interest were scattered through the different States. In 1874, D. H. Lipse came to Virginia, and was told by lawyers of Botetourt county, that Samuel Lipse alone was responsible for the loss of the testator's estate; and he expressed his purpose "not to distress his brother in his old age for his part." Samuel Lipse died in 1877. Subsequently—after certain decisions of this court had been promulgated—he was advised as to his rights against Spears' estate, and instituted this suit in January, 1879. The *corpus* of his testator's estate, the land, remained in the hands of McCulloch, who had had due notice how the title was derived from Moses Lipse' estate. The purchase money, $12,000 in gold, remained unpaid to Spears' executor by McCue, and to McCue by McCulloch. That purchase money did not even fall due until 18th August, 1882, three years and seven months after this suit was instituted. Spears' estate can only lose so much of an unlawful currency, which would, anyhow, probably have perished on hand. Now, it is well settled in principal and by authority, that a man cannot be justly charged with abandoning or neglecting to prosecute his rights, so long as he remains without knowledge of that whereon the alleged *laches* is predicated. *Rowe* v. *Bentley*, 29 Gratt, p. 763. And whether the lapse of time is sufficient to bar a recovery must, of necessity,

depend upon the particular circumstances of each case. *Harwood* v. *R. R. Co.*, 17 Wall. 79.

(6). The appellant also contends that "it was clearly erroneous to hold Spears' estate liable for anything on account of the payment of the bond, which became due 3d October, 1861. There is not a syllable of evidence in the record, which can justify any such holding."

Answer. The bill distinctly alleges that the deferred installments which were due 3d October, 1861, and 3d October, 1862, respectively, were payable in gold or its equivalent. The contract (Record, p. 31) says: "Spears agrees to pay thirty eight dollars per acre for the land." It is alleged in the bill, and not denied in the answer, that the land contained 391 acres, and that the two bonds which Spears gave the executors were for an aggregate of nine thousand, nine hundred and five, and thirty three hundred "dollars." The bonds were surrendered to Spears' executor. He does not produce them. If they were produced they would show that they were payable in "dollars," without any qualification. The Court of Appeals of Virginia and this court, have said that a debt contracted before the war, in "dollars," was payable in gold or its equivalent. The bill says that those deferred payments were both paid to Samuel Lipse in Confederate notes. The answer of Spears' executor does not deny the allegation. *Hence, that fact is admitted.* He says, in his answer, record, p. 28, that the last bond was paid 23d October, 1862, "by a check on the Fincastle bank." He does not say how the first bond was paid. That bank paid out in October, 1862, only Confederate notes. He only says that $3,000 was paid 4th November, 1861, and $1,990.73 was paid on 1st March, 1862. Thomas G. Godwin says in his deposition(Record, p. 101), in answer to question by appellant. 3d question. "What kind of currency was received and paid out (at the Fincastle bank) in 1862 and 1863?" Ans. "There was no other kind except that in general circulation—Confederate money." The debts due the bank was taken in that kind of money.

James M. Figgatt says, in his deposition (Record, p. 98), in answer to question by appellant:

3d question. "What kind of currency was received and paid out by the bank?" (the Fincastle Bank).

Answer. "From the time that Confederate money was introduced into the State, in 1861 and 1862, the bank received either Virginia money or Confederate money, as tendered."

Several witnesses say that Samuel Lipse told them that he had been compelled to receive Confederate money for the Moses Lipse land.

It is too late now, and here, for the appellant to deny that both the bonds were paid in Confederate notes. Yet they were payable in lawful money of the United States; and Samuel Lipse had no right to receive, and neither Spears nor his executor had any right to pay them, in Confederate notes or in Virginia bank notes; the transaction of payment and surrender of those bonds was invalid. See *Fretz* v. *Stover* and *McBurney* v. *Carson, ubi supra.*

(5). Again, the appellant alleges that "it was error to give any decree for so much of this estate as was going to the heirs of Christopher Lipse. These heirs were not made parties, and claimed nothing Their interests had been ascertained, severed and set apart to them by the *ex parte* settlement made before Commissioner Logan by Samuel Lipse, executor."

Answer. D. H. Lipse, surviving executor and trustee, is the sole representative of the estate. He alone has power to collect and divide the proceeds of the land. It was wholly unnecessary to have made any of the beneficiaries of the trust fund, parties to this suit. Therefore, the omission of Christopher Lipse's heirs is of no consequence. See Rule 49 of the Rules of Practice for the Courts of Equity of the United States; Desty's Federal Procedure (2d ed.), p. 292.

"*Trustees, &c., as Parties.*—In all suits concerning real estate, which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale,

&c., such trustees shall represent the persons beneficially interested in the estate, &c.; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, parties to the suit," &c.

Christopher Lipse died in Indiana before the war, and his heirs lived there during the war, and still live there. See D. H. Lipse's deposition, Record, pp. 94–5.

The *ex-parte* settlement made in Botetourt county by Commissioner Logan in nowise affected the interests of Christopher Lipse's heirs.

(4). Appellant assigns that, "It was error to give any decree in favor of these parties, or for the portions of those parties who had received their portions in Confederate money and had executed full discharge therefor to the executors. In *Horn* v. *Lockhart, supra*, this court said: 'Had the legatees of the testator voluntarily received the bonds in discharge of their respective legacies, the case would have presented a very different aspect to us. The estate might have been treated as closed and settled, but such is not the fact.' The claim that any of these received their shares under duress—moral or legal—is preposterous and false; and if it were shown that they did so receive them, how is it possible to hold Spears' estate responsible therefor? The decree complained of is, on this point, manifestly and outrageously unjust."

Answer. The case relied on by appellant to sustain this assignment is very different from the case here. That was a suit by legatees to compel the executor to settle. He had, under the laws of Alabama and under a decree of its probate court, invested the Confederate notes which he had received in payment of an ante bellum specie debt due his testator's estate, in Confederate bonds. This court affirmed the decree of the court below, which adjudged the investment invalid, and ordered him to pay to the legatees the sum due them in lawful money of the United States. Here, it is the surviving executor and trustee, who sues to collect the purchase money for the land, which had

been devised to him and his co-executor in *joint* trust to sell and divide the proceeds among the legatees, which purchase money had been unlawfully paid to his co-executor, who had thereupon unlawfully surrendered the bonds and conveyed the land. Here, the surviving executor alone, under the will, is entitled to execute this personal confidence.

It is true, this court, *obiter dicens*, did say that, had the legatees *voluntarily* accepted the Confederate bonds, in discharge of their respective legacies, from the executor, Horn. Jr., that would have discharged his obligation to them.

While that might be so in that case, it by no means follows that the acceptance by the legatees in this case, of Confederate notes, the amount of their several legacies, would have discharged the obligation of the purchaser (Spears) for the purchase money, to the surviving executor and trustee. Those legatees might have *gratuitously* released Samuel Lipse from all obligation to them, and yet Spears' estate would not have been acquitted of its obligation to pay in lawful currency, its debt to the surviving executor trustee. Besides, what is the evidence that those legatees did so voluntarily accept Confederate notes in discharge of their claims on the executors? Is it the *ex parte* settlement? That has been shown to be entitled to no weight, force or merit, as a bar to the recovery of the surviving executor on his bill. If it be not entitled to any merit as a bar directly, how can it be indirectly?

It has been shown that the mere charging up of a debt to the estate, to the executor, is no evidence of its payment, so far as the debtor is concerned.

Accompanying the commissioner's report to the settlement made by him, are copies of the numerous receipts, purporting to have been signed by divers persons, yet there is no evidence in the record that those receipts were signed by those parties, or that they did receive the unlawful currency thereby represented, voluntarily, or that they thereby meant to acquit the executors and trustees of their testator's estate, of and from their liability

to them, for the payment to them, of the lawful money of the United States, which was justly coming to them.

The only evidence in the case which bears directly on this point, is the deposition of Joel G. Custer (Record, p. 73), and therein is pointed evidence that neither his parents or Levi Huff did voluntarily receive the Confederate notes.

If it be not in evidence that Samuel Lipse received those Confederate notes voluntarily, or if he even voluntarily, yet did not receive them lawfully, how can it be presumed that the legatees received those notes voluntarily? Those notes were all he received, or could obtain; and the mere fact (if it be considered a proved fact) they consented to receive them from him, under the circumstances, cannot be used to prove that they received them voluntarily in discharge of the obligation of Spears' estate, so as to entitle the latter to a discharge from its debts even *pro tanto.*

If the receipt by Samuel Lipse was unlawful, whether on account of fraud, duress, or the invalidity of the act of receipt and payment of unlawful currency for a specie debt, surely nothing which afterwards occurred between him and them, can help Spears' estate. Samuel Lipse was their representative; any illegality practiced on him, was an illegality practiced on them, and Spears' executor cannot be heard to ask how can he be held liable for the illegal payment by Samuel Lipse to the legatees? What Spears' executor did to Samuel Lipse, was done through the latter on them

But the court below held that the evidence did not show that these legatees had received such notes voluntarily in discharge of their legacies. Yet, for the benefit of Spears' executors that court adds a provision to its decree to the effect that the commissioner, who sells the land in default of the payment of the money which the surviving executor recovers of Spears's executor, shall hold the proceeds so as yet to give the latter, at his option, opportunity to ascertain by proof before a master which of the legatees did so receive the Confederate notes so paid by him, so as to give him means of recovering back such notes, as money

of his paid to them, and which he may be entitled to recover, but does not recognize such right of recovery as any set-off against the recovery of the surviving executor under the decree.

(3). The appellant assigns further that, "It was error to hold that Samuel Lipse and his sureties were not liable to the legatees of Moses Lipse, deceased. D. H. Lipse was one of these sureties. He, therefore, stands here as complaining of a wrong for which he is liable."

Answer. It seems sufficient to say briefly that the court below *did not so hold*, or hold anything on the subject of the liability of Samuel Lipse and his sureties to the legatees of Moses Lipse, deceased, and that the bill asked for no holding on that subject.

If Spears' executor had no right to pay the *ante-bellnm* specie debt in Confederate notes or Virginia bank bills in October, 1861, and October, 1862, and the payment was invalid (as held in *Fretz* v. *Stover*, *supra*), whatever might have been the right of Spears' executor to recover such Confederate notes of Samuel Lipse, it is hard to see how Samuel Lipse could be responsible to the legatees for money unlawfully received and the receipt whereof did not release the land or Spears' estate. But this discussion seems beside the question.

(2). Appellant, by way of a second assignment of error, says that, "Though Samuel Lipse committed a *devastavit* in receiving Confederate money in payment of the last bond, and though he and his sureties on his executorial bond may be liable on that account, still Spears' executor is not and cannot be primarily liable for such *devastavit*, unless it be clearly shown that he participated in or fraudulently procured that *devastavit*."

Answer This assignment has already been fully answered. The bill alleges, not only that Samuel Lipse was induced by circumstances brought to bear on him by Spears' executor to accept payment of Confederate notes in discharge of an *ante-bellum* specie debt due his testator against his will and consent, but also that such acceptance was invalid.

The evidence shows abundantly that Samuel Lipse regarded such notes as no value; that he refused to receive them, and said he was compelled so to do; and that Spears' executor was active in his efforts to induce Samuel Lipse to do what he (Spears' executor) well knew he had no right to do; and thus overcame that perfect freedom of will and conduct which Samuel Lipse was entitled to exercise in the premises. This is proved by the depositions of L. Linkenhoker, D. H. Lipse, Samuel M. Lipse, Catherine McClure, partly on questions put by the appellant's counsel. And it is illustrated by the cases of *Pilson, Trustee*, v. *Bushong* and *Patterson* v. *Bondurant, supra.* The evidence also shows that the state of public sentiment prevailing in Botetourt during the war was not, to put it mildly, favorable to the exercise by "a Union man" like Samuel Lipse, of perfect freedom in rejecting or accepting the Confederate money tendered him by Spears' executor.

But the bill also alleges that Samuel Lipse had no right to receive, and that Spears and his executor had no right to pay, those deferred installments of purchase money in anything but the gold coin of the United States, or in some equivalent thereto, and that the receipt and the payment of anything else, was invalid, did not discharge the debt and did not entitle Spears' executor to have the bond surrendered, or the land conveyed to him. And this position is abundantly sustained by the authorities already cited and discussed.

(1). And at his first assignment of error the appellant urges that, "Samuel Lipse, executor, was authorized by law to collect that bond, and it was not necessary that David H. Lipse, his co-executor, should join in the receipt."

Answer. This assignment also has been fully answered It however involves two questions. 1. Had Samuel Lipse acting, *solus* and independently of his co executor and co trustee, the right to collect the bonds given for the deferred installments of the purchase money, for the land which their testator had devised to them upon the joint trust, that they should sell the

same, collect the proceeds and divide them among all his children? 2. If he had the right to act *solus* and independently of his co executor and co-trustee, had he the right to receive confederate notes in payment of those installments? Both of these questions have been repeatedly answered in the negative, and what seems to be sufficient authority, has been preseuted in support of the answer.

Whatever may be, in general, the authority of one of the two executors to administer the estate by receiving and distributing the personal assets, such authority is not universal, so as to authorize him to waste assets committed to the charge of the executors. Therefore, it was decided in *Stuart's Ex'or* v. *Abbott*, 9 Gratt. 252, that "if one of the executors did contract to release the lien securing the purchase money of land sold by the testator in his lifetime, such contract would not be enforced in a court of equity against the other executors." And in *De Haven* v. *Williams*, 80 Penn. St 480, it was held that where co-executors deposited money belonging to the estate, to their joint account as executors, one of them could not release the claim of the estate to the bankers.

Here, the case would be stronger (even if Spears' bonds were part of the personal assets of the estate) and the waste of their collection in unlawful and worthless currency more glaring. Those bonds were payable in gold or its equivalent. Both executors acting together, would have had no right to receive, and neither Spears nor his executor had any right to pay the Confederate notes or the Virginia bank notes in payment of these bonds and in discharge of the debt due for the purchase money, even had Moses Lipse, in his lifetime, sold the land.

But this case differs entirely from a case of ordinary administration of personal assets. A joint power, or a joint trust, was reposed in the two executors, both of whom accepted it by proving the will and qualifying as executors. Thereby they became not mere administrators of the personalty, but joint trustees, with equal power and equal interest and could not act separately,

either in selling the trust subject, collecting the proceeds or dividing them. Ses *Miller* v. *Beverley*, 4 H. & M. (Va. Rep.) 415; 2 Minor's Inst., 210; 1 Lomax Dig., 311; Story on Eq., sec. 1280.

If they be looked upon as having a bare authority to sell the land, &c., then the authority being joint, must be executed jointy. 2 Tucker's Com's, p. 423; Co. Litt., 112 b.

In *McBurnley* v. *Carson, supra*, the question was raised whether Robertson acted, touching the bonds and mortgage of Ball, as executor or as trustee. This court said: "The matter is immaterial in this case. . . . There can, however, be no doubt upon the point suggested. Where the will contains express directions what the executors are to do, an executor who proves the will must do all he is directed to do as executor, and he cannot say he is not clothed with any of those trusts. 3 Williams Executors, 1796. . . . Where a trust is created by a will and no trustee appointed the executor is bound to act as such trustee."

The authorities referred to in this connection by the appellant's counsel apply either to the powers of an executor as respects personal assets, or the liability of one executor or trustee for the receipts of his co-executor or co trustee.

If Virginia Code, 1849, chapter 131, section 1. did not apply to the case of the resident executor (Samuel Lipse) and restrict his powers as executor and trustee, why did Spears' executor, who is a lawyer, tell him the act of March 5th, 1863, met the case, and recite that act as authority for the *sole action* of Samuel Lipse in executing the deed of 7th April, 186_, which relates the circumstances of the parties, receipts for the purchase money and conveys the land?

It is humbly submitted once more that there is no error in the decree of the court below, whereby the appellants are aggrieved, and that it should be affirmed.

GEORGE W. HANSBROUGH,
Counsel for the Appelle, D. H. Lipse.

SUPREME COURT OF THE UNITED STATES.

SPEARS' EX'OR vs. LIPSE'S EX'OR.

Supplemental Brief for Appellee.

Since the preparation of the brief of the appellee's counsel in answer to the assignment of errors by the appellant's counsel, the latter have assigned two additional errors:

I. "That the circuit court ought not to have taken jurisdiction of the case, it not appearing from the record that the controversy was one between citizens of different States."

And those counsel cite Brown v. Keane, 8 Peters, 112; Robertson v. Cease, 97 U. S. 646; Grace v. The Amer. Ins. Co., 109 U. S. 278; M. C. and L. M. R'y Co. v. Swann, 111 U. S. 379.

Ans. In the last case cited, "the record not only omits the averments necessary to give jurisdiction, but recites facts which contradict it." So said Mr. Justice Harlan, p 383

In Grace v. Amer. Ins. Co. the complaint averred *the bare residence* of the plaintiffs in New York, and that the defendant was a corporation of the State of Missouri, without additional facts, but the merits were determined and amendment allowed.

And such was likewise the allegation in Robertson v. Cease.

But it is humbly submitted that this assignment here is not true in fact, and that it does sufficiently appear from the pleadings, the proofs and records generally, taken as a whole, that this is a controversy between citizens of different States, and is brought within the jurisdiction of the court.

The fact that this point was not raised in the court below, whilst it may not absolutely prevent its being raised now and here in argument, nevertheless should cause it to be viewed less favorably.

It was formerly decided by this court that an objection for want of an averment of the citizenship of the parties, must be taken in the court below. 12 Peters, 59; 2 Otto, 90; and 5 Otto, 401.

First. The bill expressly alleges that the principal and only indispensable plaintiff, D. H. Lipse, was a citizen of the State of Indiana (see Record, pp. 3, et seq.), and that the principal and only indispensable defendant, W. A. Glasgow, permanently resided with his family in Botetourt county, within the Western District of Virginia, and other facts, which, in legal intendment, brought him within the jurisdiction of the court.

A party who permanently resides in a State with his family and carries on business, is presumably a citizen of that State. Byrne vs. Holt, 2 Wash. 282; Knox vs. Greenleaf, 4 Dall. 360.

Secondly. The proofs show that said Glasgow had resided in Fincastle in said county, and practiced as an attorney at law there from 1846 continuously to taking of his deposition on 2d September, 1880; that he qualified as executor of C. C. Spears, a native of Rockbridge, in that district, and acted as such during the war of 1861—1865; that the suit was a local suit, instituted to enforce a lien on a tract of land situated in said district, and to cancel a deed of conveyance of said land, on the ground that it had been made under an act of the insurgent Legislature of Virginia on the 5th of March, 1863, as a war measure to last only during the period of the war, and that said act was void as being contrary to the Constitution of the United States, because it impaired the obligation of the contract of sale made between D. H. Lipse, a citizen of Indiana (and surviving executor of Moses Lipse, deceased), and C. C. Spears, a native of Virginia, and because it militated against the rights of loyal citizens of the United States, outside of the Southern Confederacy, such as the bill (Record p. 7.) alleged the complainants to have been. The

said suit had necessarily to be brought in that district. Ober v. Gallagher, 93 U. S. 205.

Thirdly. The relief demanded consisted in subjecting property held by the said Glasgow, and situated in said district, to the payment of the debt charged upon it, and the summons to answer the bill and cross-bill was served on him with the said district by the Marshall thereof. See the original process and returns, the same not being in the Lynchburg printed copy of the record which the appellant has laid before this court.

It is not contended that the *bare averment* of the residence of the parties is sufficient *prima facie* to show jurisdiction; but that the fact of the said Glasgow's having a fixed permanent domicile in the said district, and of his having been served with process to answer the local suit to subject property held by him in said district, together with the other circumstances disclosed by the record, fully disclose to the court that this was a controversy between citizens of different States, and a case within its jurisdiction. See Ober vs. Gallagher, 93 U. S. Rep. p. 199.

Where these facts so plainly appear from the record, it would seem very harsh and unjust to the appellee that advantage be allowed now and here for the first time, to be taken of the want of a *formal* averment of the citizenship of the appellant.

Fourthly. But independently of the citizenship of the parties, it is submitted that the court below had jurisdiction of this case under the act of Congress enacted March 3, 1875, ch. 137, § 1, 18 Stat. 470. This case involves a question arising under the constitution of the United States. It involves the question whether or not the act of the Virginia legislature, passed March 5th, 1862, and quoted on pages 17 and 18 of appellee's brief, is repugnant to said constitution.

The bill alleges that it is unconstitutional, null and void, and the court below so decided, because it impaired the obligation of the contract of the sale of the land, and of the bonds executed by C. C. Spears for the purchase money, and because it was a war measure designed to militate against the interests of loyal citizens of the United States. Horn v. Lockhart, 17 Wall. 570; Edwards v. Kearzey, 6 Otto. 595; and Williams v. Bruffey, 6

Otto. 176. If that act is constitutional, the conveyance is valid; if not, not. This then is the very substance of the issue, and is a Federal question, over which the court below had jurisdiction. Gold W. and W. Co. v. Keyes, 96 U. S. 199.

II. "The case being heard without replication to the answer of Glasgow to the original bill, all the statements in the said answer should be taken as true and the bill dismissed."

Answer. Whatever may be the general rule, the appellant is in this case utterly unable to derive any benefit from it. It only applies where the allegations of fact and the denials are distinctly made. See Cocke vs. Minor, 25 Gratt. 246. Here the respondent Glasgow did not distinctly deny the allegations of the bill that the bonds of his testator were payable in the gold coin of the United States, or its equivalent, and that they were paid in unlawful Confederate States currency, and this is the *gist* of the whole controversy.

Moreover, Code of Virginia of 1873, ch. 177, § 4, says:

"No decree shall be reversed for want of a replication to the answer where the defendant has taken depositions as if there had been a replication. * * * * * *

In this case the appellant filed his answer on the 30th of September, 1879, and he took his own and other depositions afterwards, to-wit: 2d September, 1880.

It is understood that that the practice of the courts of the State wherein the circuit court of the U. S. is held, prevails in the latter court.

But whatever may be the Virginia practice, the practice in this court plainly settles the question against the contention of the appellant's counsel; for in the Fretz vs. Stover, 22 Wallace, 203–4, this court said:

"At the outset of this case we are met with the objection that there is no replication in the record; but this objection, on the authority of *Clements v. Moore*, 6 Wallace 310, should have been made in the court below. Not having been made there, it will be considered as having been waived. It would work great injustice in this case to allow it to be taken here for the first time, for manifestly the submission was not on bill and answer, for proofs were taken, and it is to be presumed, in the absence of anything in the record to the contrary, that they were considered by the court in the disposition of the cause."

Respectfully Submitted,

GEORGE W. HANSBROUGH.
Counsel for D. H. Lipse, Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 275.

SPEARS' EX'OR AND ALS.
vs.
LIPSE'S EX'OR AND ALS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

William A. Glasgow, Esq., executor of C. C. Spears, deceased, appellant in the above styled cause, now pending in the said Supreme Court:

Take notice, that at the regular call of the docket, I, the undersigned, David H. Lipse, executor of Moses Lipse, deceased, and appellee in the above styled cause, will move the said Supreme Court to dismiss the said cause, on the ground that the record thereof has not been printed in accordance with the rules of the said Supreme Court.

DAVID H. LIPSE,
Ex'or of Moses Lipse, deceased.
By his counsel,
G. W. HANSBROUGH.

March 24th, 1885.

Served on Thomas J. Kirkpatrick, Esq, counsel for the appellant, Wm. A. Glasgow, ex'or of C. C. Spears, deceased, 24th March, 1885.

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IN THE

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LIPSE'S EX'OR AND ALS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

Brief of the Appellee's counsel in behalf of his motion to dismiss the case for want of printing the record.

The decree appealed from was entered on the 1st day of April, 1882, and an appeal was awarded Wm. A. Glasgow, executor of C. C. Spears, deceased, and sixty days allowed him to file a bond, which was done. The appeal was docketed on the ——— day of ———, 1882, in this court. A manuscript transcript of the record was certified by F. W. Rives, clerk of the said Circuit Court. That record has never been printed in accordance with the rules of this honorable court, either as existing at that time or as since announced.

Under Rule 10, as announced prior to November 26th, 1882, it was required that:

2. "In all cases the clerk shall have twenty copies of the records printed for the court, and the costs of printing shall be charged to the government in the expenses of the court.

3. "The clerk shall furnish copy for the printer, *shall supervise the printing*, shall take care of and distribute the printed copies to the judges, the reporter, and the parties, from time to time, as required."

See Rules of the S. C. of the U. S., 1882.

As amended by this court on 26th November, 1882, Rule 10 requires that—

3. "The clerk shall take to the printer the original record in the office, except in cases prohibited by the rules When the original can not be taken, he shall furnish the printer with a manuscript copy. *He shall supervise the printing*, and see that the printed copy is properly indexed."

See 108 U. S., pp. 3 and 4.

This amendment, as well as the previous rule, applied to the record in this case.

And as amended by this court 7th January, and now in force, Rule 10 requires that—

2. "The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and *supervising the printing*, and shall notify the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not be printed, when a case is reached in the regular call of the docket, after March 1st, 1884, the case shall be dismissed.

3. "Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed, *under his supervision*, for the use of the court and of counsel. * * *

5. "*The clerk shall supervise the printing* and see that the printed copy is properly indexed." * * *

This amendment also applies to this case, as the record has never been printed in accordance with any of the rules of this court. The facts are, that the original record was transcribed by the said F. W. Rives, clerk of the said circuit court, and the transcript was certified by him as such clerk as true. This transcript was not placed in the hands of the public printer at Washington City, or elsewhere, by the clerk of this court, nor was it printed under his supervision, nor did he see the printed copy properly indexed, nor did he in any way supervise the printing thereof, nor has he certified any printed copy as a true copy of the said transcript.

It is true, there has been filed in the clerk's office of this court what purport to be printed copies of the transcript of the record in this case, and one copy has been furnished the appellees' counsel by the clerk of this court; but those copies were not printed by the public printer at Washington City, or elsewhere, but were printed at Lynchburg, Virginia; they were not printed under the supervision of the clerk of this court, and are not certified by him (nor by any one else) to be true printed copies of the original transcript, but are wholly unauthenticated.

For these reasons the appellee is advised that the said record has not been printed in accordance with the rules of this court, and consequently, in effect, not been printed at all, and for this reason this case should be dismissed.

Respectfully submitted,

G. W. HANSBROUGH,
Counsel for the Appellee.

MARCH 24th, 1885.

Served on Thomas J. Kirkpatrick, Esq., counsel for the appellant, Wm. A. Glasgow, ex'or of C. C. Spears, deceased, on 24th March, 1884.